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## THE EXTRATERRITORIAL APPLICATION OF UNITED STATES ANTITRUST LAW AND INTERNATIONAL AVIATION: A COMITY OF ERRORS

BARBARA A. BELL

**T**HE INTERNATIONAL AVIATION industry exerts a significant impact on the economy of the United States and on the economy of the world. In 1986, International Air Transport Association (IATA) members<sup>1</sup> carried 155,778,000 passengers a total of 473,490,000 kilometers on international flights.<sup>2</sup> In the same year, IATA members earned revenues of \$45,700,000 billion.<sup>3</sup> Because of the significant impact international aviation exerts on the economy, the United States is concerned with competitive practices in the industry.<sup>4</sup> As a general rule, the United States regulates competition through antitrust laws. The United States contends that its antitrust laws apply to con-

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<sup>1</sup> The International Air Transport Association is an international trade association of passenger and cargo carrying airlines. The IATA engages in various coordinating functions. In 1987, one hundred sixty-one airlines were members of the IATA. INTERNATIONAL AIR TRANS. ASS'N, 1987 ANNUAL REPORT 14-15 (1987) [hereinafter 1987 REPORT].

<sup>2</sup> *Id.* at 11.

<sup>3</sup> *Id.* at 5.

<sup>4</sup> This concern is highlighted, for example, in 49 U.S.C. app. § 1502(b) (1982) which provides in part:

In formulating United States international air transportation policy, the Congress intends that the Secretary of State, the Secretary of Transportation, and the Civil Aeronautics Board shall develop a negotiating policy which emphasizes the greatest degree of competi-

duct even outside the United States.<sup>5</sup> Airlines, however, have traditionally been immunized from the antitrust laws through statutory antitrust exemptions and provisions in treaties and bilateral agreements.<sup>6</sup> Thus, airlines have been able to engage in activities which would almost certainly be declared illegal in other industries.<sup>7</sup>

The continued existence of these exemptions has recently become doubtful. Much of the authority of the Department of Transportation to grant exemptions from the antitrust laws expires on January 1, 1989.<sup>8</sup> Senator Howard Metzenbaum (D. Ohio) has introduced the Airline Competition Act of 1987 which would apply antitrust laws to the aviation industry.<sup>9</sup> There is a real possibility that the antitrust liability of international airlines will be greatly expanded.<sup>10</sup>

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tion that is compatible with a well-functioning international air transportation system. This includes, among other things:

.....  
 (2) freedom of air carriers and foreign air carriers to offer fares and rates which correspond with consumer demand;

.....  
 (5) the elimination of operational and marketing restrictions to the greatest extent possible .....

*Id.*

<sup>5</sup> See *infra* notes 51-116 and accompanying text for a discussion of the extraterritorial reach of United States antitrust law.

<sup>6</sup> See *infra* notes 32-39 and accompanying text for a discussion of relevant antitrust exemptions.

<sup>7</sup> For example, through the IATA airlines engage in rate setting and revenue pooling agreements which could probably be characterized as price-fixing and market division in other industries. Tompkins, *The North Atlantic-Competition or Confrontation: The Potential Impact of United States Antitrust Law on International Air Transportation*, 7 AIR L. 48, 60-61 (1982). Other activities which may be suspect include exchanging cost, price and customer data, agreements among carriers to accept other carriers' passenger tickets and baggage checks, credit arrangements among airlines and price cutting through rebates. P. BARLOW, AVIATION ANTITRUST 66-67 (1988). Barlow extensively analyzes the possible antitrust violations in international aviation. *Id.* at 65-69.

<sup>8</sup> 49 U.S.C. app. § 1551(a)(6) (Supp. III 1985).

<sup>9</sup> S. 806, 100th Cong., 1st Sess., 133 CONG. REC. S3619 (daily ed. Mar. 20, 1987). In relevant part the bill provides: "Notwithstanding any other provision of law . . . the Sherman Act shall apply to the air transportation industry. . . . This Act, as such Act applies to overseas air transportation, shall become effective on January 1, 1989." *Id.* at S3619-20.

<sup>10</sup> P. BARLOW, *supra* note 7, at 40. "[O]nly one concluding remark can be made

Naturally, the airline industry is not enthusiastic about this possibility. Both the 1985 and 1986 Annual Reports of the IATA highlight the industry's concern with "[t]he gradual but persistent extension of the use by governments of domestic competition laws in the field of international aviation . . . ."<sup>11</sup> The International Civil Aviation Organization strongly condemns the application of local competition laws to international aviation.<sup>12</sup>

To compound the problem, a number of the United States' allies have reacted negatively to the possibility that United States antitrust laws might be applied to their airlines. Among the most vocal are the British, who have repeatedly called for the immunization of British airlines from the United States antitrust laws.<sup>13</sup> In an attempt to avoid the United States antitrust laws, several countries, including Great Britain, have enacted blocking statutes. These statutes allow foreign governmental officials to prohibit their country's nationals from cooperating with United States courts.<sup>14</sup> The statutes often further provide for the recovery of antitrust judgments enforced in the

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with certainty. That is that there will be greater antitrust exposure in the years following deregulation." *Id.*

<sup>11</sup> INTERNATIONAL AIR TRANS. ASS'N, 1986 ANNUAL REPORT 14 (1986) [hereinafter 1986 REPORT]; see also INTERNATIONAL AIR TRANS. ASS'N, 1985 ANNUAL REPORT 14 (1985) [hereinafter 1985 REPORT].

<sup>12</sup> ICAO Doc. 9297, AT-Conf/2 at 35 (1980). The organization believes that "unilateral actions which disrupt multilateral tariff negotiations . . . place international co-operation in peril and, through their destabilizing influence, threaten the economic performance of the international aviation system as a whole." *Id.*

<sup>13</sup> See generally *British Reject New Fares*, AV. WK. & SPACE TECH., Oct. 29, 1984, at 30, 30-31 (British refused to approve new fare proposals until antitrust immunity was guaranteed); Brown, *British Transport Minister Decries Bermuda 2 Pact*, AV. WK. & SPACE TECH., Nov. 5, 1984, at 26, 26-27 (British Secretary of State for transport declared air services agreement virtually unworkable because U.S. refused antitrust immunity); *British Reject Low Fares Despite U.S. Action*, AV. WK. & SPACE TECH., Nov. 12, 1984, at 81 (British sought agreement limiting antitrust liability).

<sup>14</sup> See, e.g., AUSTL. ACTS P. No. 3 (1984) (allowing Commonwealth Attorney General to prohibit enforcement of foreign antitrust judgments and allowing Commonwealth Attorney General to prohibit Australians from giving evidence); Protection of Trading Interests Act, 1980, ch. 11 (allowing the British Secretary of State to prohibit compliance with any requirements of foreign courts if it infringes the sovereignty of the United Kingdom).

United States.<sup>15</sup>

This comment discusses the problems of applying United States antitrust law to international aviation. The first section discusses the antitrust background of international aviation, focusing on various threats of liability for international aviation.<sup>16</sup> The second section considers the current status of the extraterritorial application of the United States antitrust laws.<sup>17</sup> The third section summarizes criticisms of the federal courts' recently developed comity analysis.<sup>18</sup> Finally, the fourth section rejects the currently espoused comity analysis and proposes an analysis focusing on jurisdictional contacts.

## I. BACKGROUND: THE AVIATION INDUSTRY'S ANTITRUST EXPERIENCE

In most countries, bilateral and multilateral air transport agreements regulate the activities of international air carriers.<sup>19</sup> These agreements cover many facets of airline operations and often include provisions related to the establishment of tariffs.<sup>20</sup> Generally, the carriers have the responsibility for negotiating proposed rates. The carriers submit these proposed rates to the governments who are parties to the agreement for approval.<sup>21</sup>

As a result of the air transport agreement system, the emphasis in international air carriage is on non-price

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<sup>15</sup> These provisions are commonly known as clawback provisions. Both Great Britain and Australia have clawback laws. For examples of clawback provisions, see AUSTL. ACTS P. No. 3 (1984) (allowing recovery of antitrust judgments paid in foreign countries); Protection of Trading Interests Act, 1980, ch. 11 (providing for recovery of multiple damage awards).

<sup>16</sup> See *infra* notes 19-50 and accompanying text for a discussion of the international aviation industry antitrust history.

<sup>17</sup> See *infra* notes 51-132 and accompanying text for a discussion of the extraterritorial application of the United State antitrust laws.

<sup>18</sup> See *infra* notes 134-172 and accompanying text for a discussion of criticisms of the comity analysis.

<sup>19</sup> Dempsey, *The Role of the International Civil Aviation Organization on Deregulation, Discrimination and Dispute Resolution*, 52 J. AIR L. & COM. 529, 541-47 (1987).

<sup>20</sup> *Id.* at 542.

<sup>21</sup> *Id.*

rather than price competition.<sup>22</sup> Ordinarily, the elimination of price competition is a per se violation of the antitrust laws.<sup>23</sup> However, until recently, rate-setting and similar airline activities have not been subject to antitrust scrutiny in the United States.<sup>24</sup>

The Federal Aviation Act of 1958<sup>25</sup> grants the Department of Transportation regulatory power over numerous aspects of competition in international air commerce<sup>26</sup> including consolidations and mergers,<sup>27</sup> pooling agreements,<sup>28</sup> and mutual aid agreements.<sup>29</sup> The Department of Transportation is required to evaluate proposed transactions between carriers to determine whether the anticompetitive effects of the proposed transactions outweigh the efficiencies of the arrangements.<sup>30</sup> The Department of Transportation may not approve agreements between carriers that limit capacity or fix rates other than joint rates.<sup>31</sup>

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<sup>22</sup> Tompkins, *supra* note 7, at 60.

<sup>23</sup> *Id.* at 57-58. Per se violations of the antitrust laws are "agreements or practices . . . so plainly anticompetitive that they are declared unlawful without an elaborate inquiry into the precise harm caused." P. BARLOW, *supra* note 7, at 47.

<sup>24</sup> Tompkins at 58. However, from 1978 to 1985 the IATA rate-making conferences were the subject of a Civil Aeronautics Board Show Cause Order. See *U.S. Closes Proceeding to Withdraw Antitrust Immunity from IATA Meetings*, AV. WK. & SPACE TECH., May 20, 1985, at 43. The effect of the order would have been to prevent United States carriers from participating in IATA rate-making meetings. *Id.* However, the order was withdrawn when the Department of Transportation took over the functions of the Civil Aeronautics Board. The Department of Transportation concluded that "IATA fare agreements substantially reduced competition but that antitrust immunity of fare-setting was required because of international comity and foreign policy considerations." *Id.* Critics of the Civil Aeronautics Board Sunset Act, 49 U.S.C. app. § 1551 (Supp. III 1985), feared that the result of transferring antitrust exemption authority to a "highly political agency" would result in less effective enforcement of the antitrust laws. *CAB Sunset Bill Passes Despite Antitrust Question*, AV. WK. & SPACE TECH., Oct. 1, 1984, at 33. The Department of Transportation's dismissal of the Civil Aeronautics Board Show Cause Order tends to indicate that some of these fears may have come true.

<sup>25</sup> 49 U.S.C. app. §§ 1301-1552 (1982).

<sup>26</sup> For a thorough discussion of the Department of Transportation's regulatory authority and philosophy, see P. BARLOW, *supra* note 7, at 34-40.

<sup>27</sup> 49 U.S.C. app. § 1378 (1982).

<sup>28</sup> 49 U.S.C. app. § 1382 (1982).

<sup>29</sup> *Id.*

<sup>30</sup> 49 U.S.C. app. §§ 1378, 1379, 1382 (1982).

<sup>31</sup> 49 U.S.C. app. § 1382(a)(2)(A)(iii) (1982).

Because the Department of Transportation has such a high degree of control over the competitive activities of international airlines, the Department of Transportation has the authority to exempt certain approved anticompetitive conduct to the extent necessary to allow the airline to engage in the approved transaction.<sup>32</sup> In light of Congress' expressed preference for the maintenance of competition in the airline industry, it might seem unusual that Congress would authorize antitrust exemptions for mergers, interlocking boards, and pooling agreements. However, in replacing free competition with regulation, Congress has expressed the opinion that the market cannot adequately control competition in aviation.<sup>33</sup>

Although the Department of Transportation may immunize anticompetitive conduct, international air carriers are not entirely free from the reach of the antitrust laws. In virtually any case, the question of whether the Department of Transportation authorized the particular conduct in question can still arise.<sup>34</sup> Further, even if the Department of Transportation specifically authorized a given transaction, the transaction may not be entirely free from judicial review.<sup>35</sup> A court may find, for instance, that the Department of Transportation did not have the authority

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<sup>32</sup> 49 U.S.C. app. § 1384 (1982). In relevant part the statute provides:

In any order made under section 1378 [mergers and consolidations], 1379 [interlocking boards] or 1382 [pooling and other agreements] of this Appendix, the Board may, as part of such order, exempt any person affected by such order from the operation of the "antitrust laws" . . . to the extent necessary to enable such person to proceed with the transaction specifically approved by the Board in such order and those transactions necessarily contemplated by such order, except that the Board may not exempt such person unless it determines that such exemption is required in the public interest.

*Id.*

<sup>33</sup> 1 P. AREEDA & D. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 222, at 134 (1978).

<sup>34</sup> *Id.* at 135.

<sup>35</sup> *Id.* at 135-36. The fact that it is an agency rather than a court granting antitrust immunity may lead to different outcomes. Areeda and Turner note that "notwithstanding agency consideration of competitive values and the antitrust court's consideration of industry peculiarities, allocating a balancing decision to an agency will often produce a judgment different from what would have resulted by entrusting that decision in the first instance to an antitrust court." *Id.* at 136.

to authorize the activity in question.<sup>36</sup> Thus, Department of Transportation conferred immunity is not a license to engage in all types of anticompetitive behavior.

Nevertheless, from the airlines' perspective, these antitrust immunities, as subject to uncertainty as they may be, are superior to no immunity at all. Unfortunately for the airlines, Congress is becoming increasingly averse to aviation antitrust immunity. Much of the Department of Transportation's authority to immunize conduct from antitrust scrutiny expires on January 1, 1989.<sup>37</sup> Although Congress has not yet indicated that it will permanently withdraw antitrust immunity from international aviation,<sup>38</sup> there are indications that the immunity provisions may be allowed to fade into history. In March 1987, Senator Howard Metzenbaum (D. Ohio) introduced a bill to immediately end antitrust immunity for the domestic aviation industry and to withdraw international aviation antitrust immunity on January 1, 1989.<sup>39</sup>

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<sup>36</sup> *Id.* at 146. Areeda and Turner discuss the problem of agency antitrust immunization using aviation as an example. "[A]greements among air carriers are immune from the antitrust laws when approved by the Civil Aeronautics Board. But even there, many problems remain. An antitrust court may have to decide what precisely had been approved by the administrators and how far the antitrust shield that accompanies approval extends." *Id.* (footnotes omitted).

<sup>37</sup> 49 U.S.C. app. § 1551(a)(6)-(7) (Supp. III 1985).

<sup>38</sup> The legislative history of The Civil Aeronautics Board Sunset Act indicates that "[t]his sunset date will give Congress an opportunity to consider at that time whether there is still a need for administrative regulation of air carrier mergers and acquisitions and whether there is still a need for statutory authority to grant certain air carrier transactions immunity from the antitrust [sic] laws." H.R. REP. NO. 793, 98th Cong., 2d Sess. 11, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 2857, 2867. The report further notes: "The establishing of a sunset date for these authorities should not be construed as an indication that the Committee has reached a decision on whether the authorities should be renewed after they sunset." *Id.*

<sup>39</sup> S. 806, 100th Cong., 1st Sess., 133 CONG. REC. S3619 (daily ed. Mar. 20, 1987). For the text of the bill, see *supra* note 9. Introducing his bill, Senator Metzenbaum stated:

[T]he airline industry is a cozy oligopoly. More carriers enjoy monopoly power on more routes than ever before.

... If we really want the airlines to compete by offering low fares and better service, it's time we ended the antitrust moratorium for the airlines. I urge my colleagues to join me in this effort to make sure that the airlines understand that their free ride is over.



Obviously, in light of the uncertainty surrounding Department of Transportation antitrust immunity, it is reasonable that the airline industry has sought to persuade the executive branches of both the United States and foreign governments that antitrust immunity should be included in air service agreements.<sup>40</sup> Yet even if an antitrust provision were included in an air service agreement, the United States antitrust laws could still apply. The reason for this result is that unless the United States Senate consented to the air service agreement, the agreement would be merely an executive agreement, not a treaty.<sup>41</sup> A potential problem thus arises. Under the foreign law, the air service agreement is a treaty, but under United States law the air service agreement does not supersede the antitrust laws.<sup>42</sup>

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*Id.*

<sup>40</sup> See 1985 REPORT, *supra* note 11, at 14. The IATA has indicated that it "will press for intergovernmental agreement on guidelines for resolution of disputes arising in this context and possible development of a standard bilateral clause." *Id.*

<sup>41</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 comment a (1987) [hereinafter RESTATEMENT]. Under the United States Constitution, the President has the power to make treaties with foreign nations "by and with the Advice and Consent of the Senate . . . provided two thirds of the Senators present concur . . ." U.S. CONST. art. II, § 2, cl. 2. The Restatement explains the effect of executive agreements. "Like treaties and other international agreements, they can be superseded as domestic law by later international agreements or by an act of Congress within its constitutional authority. Their status in relation to earlier Congressional legislation has not been authoritatively determined." RESTATEMENT, *supra*, § 303 comment j. *But see* RESTATEMENT, *supra*, § 115 reporter's note 5.

It has been held, however, that an executive agreement made by the President on a matter within the constitutional authority of Congress, such as the regulation of commerce with foreign nations is subject to the controlling authority of Congress and will not be given effect in the face of an inconsistent Congressional act . . . The act of a single person, even the President, cannot repeal an act of Congress.

*Id.* (citations omitted).

<sup>42</sup> This problem has been the subject of much discord between the United States and Great Britain. Under United States law the Bermuda II air service agreement is merely an executive agreement. Under British law the agreement is a treaty which protects the actions British airlines take under the terms of the treaty from United States antitrust law. See *U.S. Recognizes British Position*, *Av. Wk. & SPACE TECH.*, Nov. 5, 1984, at 27.

The airline industry is understandably concerned about the current inability to assure antitrust immunity. The airlines claim that they do not want to avoid competition.<sup>43</sup> Rather, they argue that competition laws should be applied in ways that are consistent with the unique characteristics of international aviation.<sup>44</sup> The airlines argue that the application of domestic competition law is inconsistent with the spirit, if not the letter, of many air transport agreements;<sup>45</sup> that certain governments require participation in coordinating activities;<sup>46</sup> and that the unique nature of the industry makes cooperation more appropriate than competition.<sup>47</sup> None of these arguments is compelling.

As discussed above, if an air service agreement has not been approved as a treaty of the United States, United States antitrust law supersedes the agreement. Because the United States is aware of the relative weight of bilateral agreements versus domestic law, it can be argued that if the United States truly meant to override the antitrust laws, the service agreements would have been enacted as treaties. The second argument can be disposed of just as easily. If participation in rate making and other coordinating activity is truly compelled by a foreign government, the foreign compulsion defense applies, thus preventing antitrust liability.<sup>48</sup> Finally, if airlines could

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<sup>43</sup> See generally 1986 REPORT, *supra* note 11, at 14.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Feazel, *Carriers Oppose Government Efforts to Ban IATA Conference Activities*, AV. WK. & SPACE TECH., Oct. 28, 1985, at 31.

<sup>47</sup> 1986 REPORT, *supra* note 11, at 14.

<sup>48</sup> The sovereign compulsion doctrine prevents the United States from imposing liability for conduct required by a foreign government. See *Williams v. Curtiss-Wright Corp.*, 694 F.2d 300, 302-03 (3d Cir. 1982); *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1298-99 (D. Del. 1970). The foreign compulsion doctrine stems from the act of state doctrine. Under the act of state doctrine the United States cannot hold a foreign government liable for conduct condemned by the United States antitrust laws. See *International Ass'n of Machinists & Aerospace Workers v. Organization of the Petroleum Exporting Countries*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982). The act of state doctrine arises out of the doctrine of separation of powers among the branches of the United States government. *Id.* Purely commercial conduct by a

demonstrate that, in fact, cooperation is a more effective means of achieving consumer economic welfare than competition, then it is conceivable that some restraints on trade would be found lawful.<sup>49</sup> If, on the other hand, the only consumer benefits the airlines could point to were noneconomic, any resulting restraint would be unlawful.<sup>50</sup> In sum, it seems likely that most, if not all, of the special circumstances that the international aviation industry claims justify exclusion from the antitrust laws can be adequately handled in the context of ordinary antitrust doctrine.

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sovereign is not exempt from United States antitrust liability, see *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 705 (1976), unless the purpose of the commercial activity is to protect a vital interest of the foreign nation. See *In re Investigation of World Arrangements with Relation to the Prod., Transp., Ref. & Distrib. of Petroleum*, 13 F.R.D. 280, 290-91 (D.D.C. 1952).

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (1982) provides similar protection for foreign sovereigns. The Foreign Sovereign Immunities Act is distinct from the act of state doctrine. *International Ass'n of Machinists & Aerospace Workers v. Organization of the Petroleum Exporting Countries*, 649 F.2d at 1359. The Foreign Sovereign Immunities Act is jurisdictional, the act of state doctrine is not. *Id.* The Foreign Sovereign Immunities Act does not apply to cases based on a foreign government's commercial activities. 28 U.S.C. § 1605(a)(2).

While the act of state doctrine and foreign sovereign immunity apply only to governments, a private party may make use of the related sovereign compulsion doctrine when he has been required to commit an illegal act by a foreign sovereign. *Interamerican*, 307 F. Supp. at 1298-99. When the foreign sovereign merely condones the defendant's acts, the sovereign compulsion doctrine is not available. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962). The Foreign Sovereign Immunity Act, the act of state doctrine and the sovereign compulsion doctrines are especially important in aviation antitrust cases because of the high degree of state ownership and regulation of airlines. For example fourteen airlines are 100% owned by foreign governments, fourteen carriers are over 50% owned by foreign governments, and another nine are approximately 50% controlled by foreign governments. See Cook, *Counting the Dragon's Teeth: Foreign Sovereign Immunity and Its Impact on International Aviation Litigation*, 46 J. AIR L. & COM. 687, 705-06 n.86 (1981). A complete discussion of these doctrines is beyond the scope of this Comment.

<sup>49</sup> Antitrust Guidelines for International Operations, 53 Fed. Reg. 21,587 (1988) (proposed June 8, 1988) (proposals for revisions to ANTITRUST DIV., U.S. DEP'T JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (1977)). The proposed guidelines explain that when a risk of anticompetitive effects is offset by significant efficiency resulting in an increase in consumer welfare a restraint is not unlawful. *Id.*

<sup>50</sup> See *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692-96 (1978).

However, expansion of the application of United States antitrust laws to the aviation industry could result in severe international tensions. United States courts would be required to deal with foreign airlines in the same way that they currently deal with foreign plaintiffs and defendants in other industries. As the following sections of this comment explain, the extraterritorial application of United States antitrust law is currently severely criticized. Application of these laws as they stand to international aviation would likely result in even greater criticism.

## II. THE APPLICATION OF UNITED STATES ANTITRUST LAWS IN INTERNATIONAL SETTINGS

### A. *The Historical Development of the Effects Test*

The language of the United States antitrust laws is quite broad. Under Section One of the Sherman Act, for instance, the United States antitrust laws apply to any person who "make[s] any contract or engage[s] in any combination or conspiracy" which restrains "trade or commerce among the several States, or with foreign nations . . . ."<sup>51</sup> Arguably this section could be construed to reach foreign actions which affect *only* foreign markets. Federal courts have never given Section One such a broad construction. In fact, early federal court decisions construed the clause quite narrowly.

Among the earliest foreign trade cases to reach the Supreme Court was *American Banana Co. v. United Fruit Co.*<sup>52</sup> In *American Banana*, the plaintiff alleged, among other things, that the defendant had encouraged the Costa Rican government to seize the plaintiff's banana plantation. The plaintiff claimed that this action constituted a scheme to control and monopolize the banana trade.<sup>53</sup> The Supreme Court refused to agree that a

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<sup>51</sup> 15 U.S.C. § 1 (1982).

<sup>52</sup> 213 U.S. 347 (1909).

<sup>53</sup> *Id.* at 354. The fact situation was relatively complex. The plaintiff's predecessor in interest established the banana plantation in 1903 in Panama, which at the time was part of Colombia. The Colombian government agreed to allow

United States court could claim jurisdiction over acts done outside of the United States.<sup>54</sup> Justice Holmes noted that to hold otherwise "not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent."<sup>55</sup>

Courts began to disregard Justice Holmes' broad statements in *American Banana* almost immediately. Just three years later in *United States v. Pacific & Arctic Railway & Navigation Co.*,<sup>56</sup> the Court concluded that it had jurisdiction over the parties to an agreement alleged to have restrained a transportation route between the United States and Canada. While the Court did not distinguish *American Banana*, the Court noted that if it were to strictly apply the rule that a court does not have jurisdiction over activities which occur outside the borders of its country, then neither the United States nor Canada would have jurisdiction over the case, an obviously unacceptable result.<sup>57</sup> Be-

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Costa Rica to administer the territory in which the plantation was located. During the latter part of 1903, Panama revolted and declared that the territory which included the plantation was part of Panama. Costa Rica likewise claimed the plantation, and in July of 1904 seized the plantation. *Id.*

<sup>54</sup> *Id.* at 357-59. Justice Holmes characterized the case as requiring a determination of the legitimacy of a foreign state's motivation in engaging in official action, and refused to decide the case. *Id.* Thus, it could be argued that the decision turned on the application of the act of state doctrine which in some instances immunizes the conduct of foreign sovereigns. If that is the case, Holmes' statements regarding general principles of extraterritorial jurisdiction are merely dicta.

<sup>55</sup> *Id.* at 356.

<sup>56</sup> 228 U.S. 87 (1913).

<sup>57</sup> *Id.* at 105-06; see also *Thomsen v. Cayser*, 243 U.S. 66, 88 (1917) (holding that the Sherman Act applied to a rate discrimination conspiracy in shipping between New York and South Africa because it affected U.S. commerce and was put into operation in the United States). The Southern District of New York followed similar reasoning in *United States v. Hamburg-Amerikanische Packet-Fahrt-Actien-Gesellschaft*, 200 F. 806 (S.D.N.Y. 1911), *rev'd on other grounds*, 239 U.S. 466 (1916). The case involved an agreement between steamship companies regarding the carriage of steerage passengers between the United States and Europe. The court noted that the contract "directly and materially affected" the commerce of the United States, and noted that it saw "nothing to warrant the contention that the [Sherman] act should be narrowly interpreted as prohibiting only contracts which are to be performed wholly within the territorial jurisdiction of the United States . . . ." *Id.* at 807. The court further indicated that it did not believe the

cause at least some of the illegal activity took place in the United States, the Court was willing to find jurisdiction.<sup>58</sup>

The first case to cite and distinguish *American Banana* was *United States v. Sisal Sales Corp.*<sup>59</sup> In *Sisal*, the plaintiff alleged that the defendants sought to monopolize the importation and sale of sisal in the United States through actions taken in Mexico. The Court distinguished *American Banana* noting: "The United States complain of a violation of their laws within their own territory by parties subject to their jurisdiction, not merely of something done by another government at the instigation of private parties."<sup>60</sup>

These cases established that the United States antitrust laws extended to conduct occurring in foreign countries if at least some of the illegal acts took place in the United States. The question of whether the United States antitrust laws imposed liability for conduct occurring wholly outside of the United States but affecting United States commerce was, however, still open. Learned Hand answered this question affirmatively in the landmark *Alcoa* decision.<sup>61</sup> In *Alcoa*, the government alleged that several European aluminum companies had conspired to set quotas, including quotas for the export of aluminum to the United States. *Alcoa* was not a party to the agreement but derived benefits from the agreement.<sup>62</sup>

Hand first noted that while the Constitution gave Congress broad power to regulate foreign commerce, it was not necessarily true that in enacting the Sherman Act, Congress had exercised its full constitutional authority to

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broader construction would lead to international complications, and that even if it might, the complications were not for the court to consider. *Id.*

<sup>58</sup> *Pacific & Arctic Ry.*, 228 U.S. at 105-06.

<sup>59</sup> 274 U.S. 268, 275-76 (1927).

<sup>60</sup> *Id.* at 276.

<sup>61</sup> *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945). The *Alcoa* case was certified to the Second Circuit by the United States Supreme Court because the Supreme Court could not obtain a quorum of six justices to hear the case. *Id.* at 421.

<sup>62</sup> *Id.* at 442.

regulate foreign commerce.<sup>63</sup> Hand recognized, however, that nations have the inherent authority to apply their laws outside their borders in some cases, noting: "[I]t is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends . . . ."<sup>64</sup>

Hand identified two elements necessary to justify the exercise of jurisdiction over parties engaged in illegal conduct outside the United States: an effect within the United States<sup>65</sup> and an intent to affect the United States.<sup>66</sup> Hand noted that once the plaintiff had proved an intent to

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<sup>63</sup> *Id.* at 443. "We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States." *Id.*

<sup>64</sup> *Id.* This is an aspect of the principle of territoriality. RESTATEMENT, *supra* note 41, § 402 comment d. According to the Restatement, international law recognizes several bases for a country's exercise of jurisdiction including:

(1)(a) conduct that, wholly or in substantial part, takes place within its territory; (b) the status of persons, or interests in things, present within its territory; (c) conduct outside its territory that has or is intended to have substantial effect within its territory; (2) the activities, interests, status or relations of its nationals outside as well as within its territory; and (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

*Id.* § 402. The bases of jurisdiction stated in § 1 are territorial bases of jurisdiction, while the basis of jurisdiction in § 2 is nationality. *Id.* at comment a. Territoriality is the most common basis of jurisdiction. *Id.* at comment c. An example of territoriality in the exercise of jurisdiction is the assertion of jurisdiction over a national of another jurisdiction who shoots a national of the forum state from across the border. *Id.* at comment d.

<sup>65</sup> *Alcoa*, 148 F.2d at 443. Hand explained:

Two situations are possible. There may be agreements made beyond our borders not intended to affect imports, which do affect them, or which affect exports. Almost any limitation of the supply of goods in Europe, for example, or in South America, may have repercussions in the United States. . . . Yet when one considers the international complications likely to arise from an effort in this country to treat such agreements as unlawful, it is safe to assume that Congress certainly did not intend the Act to cover them.

*Id.*

<sup>66</sup> *Id.* at 443-44. The court explained:

Such agreements may on the other hand intend to include imports into the United States, and yet it may appear that they have had no effect on them . . . . [F]or argument we shall assume that the Act does not cover agreements, even though intended to affect imports

affect the United States, the defendant had the burden of showing that the effect did not occur.<sup>67</sup> Hand's test is commonly known as the effects test. After *Alcoa*, it was clear that as long as the effect of intentional illegal conduct is felt in the United States, none of the unlawful acts incident to a violation of the United States antitrust laws must be performed in the United States.<sup>68</sup>

Hand's test did not, however, quantify the magnitude of the effect necessary to trigger jurisdiction over a foreign defendant. Further, *Alcoa* did not indicate whether a foreign plaintiff could claim the benefit of the United States antitrust laws against a defendant whose illegal conduct occurred outside the United States. Thus, after *Alcoa* at least two distinct lines of cases emerged: cases which quantified the effect on the United States necessary to assert jurisdiction,<sup>69</sup> and cases which considered whether the United States antitrust laws were directed at activities designed to restrain *foreign* markets.<sup>70</sup> Both lines of cases led to the expansion of the extraterritorial reach of the United States antitrust laws.

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or exports, unless its performance is shown actually to have had some effect upon them.

*Id.*

<sup>67</sup> *Id.* at 444. "[W]hen the parties took the trouble specifically to make the depressant apply to a given market, there is reason to suppose that they expected that it would have some effect. . . ." *Id.*

<sup>68</sup> See, e.g., *United States v. National Lead Co.*, 63 F. Supp. 513, 527 (S.D.N.Y. 1945) ("[a]greements . . . for the purpose and with the effect of suppressing imports into and exports from the United States, are unlawful under the Sherman Act . . ."), *aff'd*, 332 U.S. 319 (1947); *Sanib Corp. v. United Fruit Co.*, 135 F. Supp. 764, 766 (S.D.N.Y. 1955) ("that the acts effectuating the conspiracy were performed partly in Honduras does not put the conspiracy beyond reach of [the antitrust] laws, since the agreement . . . obviously was intended to, and in fact did, affect the interstate and foreign commerce of the United States.") (citation omitted).

<sup>69</sup> See *infra* notes 71-76 and accompanying text for a discussion of cases which quantified the effect necessary for jurisdiction.

<sup>70</sup> See *infra* notes 77-91 and accompanying text for a discussion of cases considering whether the United States antitrust laws are designed to prevent anticompetitive conditions in foreign markets.



### B. *The Expansion of the Effects Test*

After *Alcoa*, courts arrived at numerous formulations of the effects test. In one of the first cases decided using the *Alcoa* test, the district court for New Jersey set forth the requirement that the restraint must "deleteriously affect [United States] commerce."<sup>71</sup> In the same year the Northern District of Ohio described the effects test as requiring "a direct and influencing effect" on United States commerce.<sup>72</sup> In *United States v. R.P. Oldham Co.*,<sup>73</sup> the Northern District of California required the plaintiff to demonstrate a "direct and substantial restraint",<sup>74</sup> while in *Dominicus Americana Bohio v. Gulf & Western Industries, Inc.*<sup>75</sup> the Southern District of New York required merely that the effect not be de minimus. Understandably the wide variety of formulations made it difficult for a foreign citizen to determine whether his business activities might subject him to liability under the United States antitrust laws.<sup>76</sup>

Further difficulties arose when United States courts be-

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<sup>71</sup> *United States v. General Elec. Co.*, 82 F. Supp. 753, 891 (D.N.J. 1949), *modified*, 115 F. Supp. 835 (D.N.J. 1953).

<sup>72</sup> *United States v. Timken Roller Bearing Co.*, 83 F. Supp. 284, 309 (N.D. Ohio 1949), *modified and aff'd*, 341 U.S. 593 (1951).

<sup>73</sup> 152 F. Supp. 818 (N.D. Cal. 1957).

<sup>74</sup> *Id.* at 822.

<sup>75</sup> 473 F. Supp. 680, 687 (S.D.N.Y. 1979).

<sup>76</sup> The foreign defendant is on surer ground when evaluating the likelihood that the Justice Department will bring suit than in determining whether he will be subject to private action. The Justice Department has promulgated guidelines to indicate when it will consider prosecuting antitrust violations. ANTITRUST DIV., U.S. DEP'T JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (1977). The Justice Department's enforcement policy is based on the idea that the primary goals of United States antitrust laws are "to protect the American consuming public by assuring it the benefit of competitive products and ideas" and "to protect American export and investment opportunities against privately imposed restrictions." *Id.* at 4-5. With these goals in mind, the Justice Department has concluded that prosecution is appropriate "when there is a *substantial and foreseeable* effect on the United States commerce." *Id.* at 6 (emphasis added). The Justice Department thus seeks to avoid "unnecessary interference with the sovereign interests of foreign nations." *Id.* at 6-7.

The Justice Department recently published a revised draft of the Guide for comment. Antitrust Guidelines for International Operations, 53 Fed. Reg. 21,584 (1988) (proposed June 8, 1988). The new guidelines express the same goals. *Id.* The Justice Department proposes prosecution under the new guidelines when

gan to extend the United States antitrust laws to protect foreign consumers in foreign markets. Although the antitrust laws were designed to protect American consumers,<sup>77</sup> an increasing number of foreign plaintiffs sought access to federal courts claiming antitrust violations. Courts were faced with the dilemma of deciding what type of nexus must exist to justify the assertion of jurisdiction under the United States antitrust laws.

In *Sulmeyer v. Seven-Up Co.*,<sup>78</sup> both the plaintiff and the defendant were citizens of the United States. The plaintiffs alleged that Seven-Up had entered into illegal agreements with foreign bottlers to prevent Bubble Up from entering foreign markets.<sup>79</sup> Thus the market affected by the illegal agreement was a foreign market. The court rejected the argument that the claim lacked a jurisdictional nexus, explaining that the plaintiffs' allegation of a substantial impact on their commerce between the United States and foreign countries provided the requisite basis for the claim.<sup>80</sup>

Courts also concluded that jurisdiction existed even

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conduct causes a "direct, substantial and reasonably foreseeable effect on competition and consumers in the United States." *Id.* at 21,586.

In exercising its prosecutorial discretion, the Justice Department proposes considering:

- (1) The relative significance, to the violation alleged, of the conduct within the United States to conduct abroad;
- (2) The nationality of the persons involved or affected by the conduct;
- (3) The presence or absence of a purpose to affect United States consumers or competitors;
- (4) The relative significance and foreseeability of the effects of the conduct on the United States as compared to the effects abroad;
- (5) The existence of reasonable expectations that would be furthered or defeated by the action; and
- (6) The degree of conflict with foreign law or articulated foreign economic policies.

*Id.* The Justice Department seeks to avoid chilling acceptable business transactions. *Id.* at 21,597.

<sup>77</sup> "Congress' foremost concern in enacting the antitrust laws was the protection of American consumers and competitors." *A.G.S. Elects., Ltd. v. B.S.R. (U.S.A.), Ltd.*, 460 F. Supp. 707, 711 (S.D.N.Y.), *aff'd*, 591 F.2d 1329 (2d Cir. 1978).

<sup>78</sup> 411 F. Supp. 635 (S.D.N.Y. 1976).

<sup>79</sup> *Id.* at 637.

<sup>80</sup> "[P]laintiffs have alleged substantial impact on their United States business and property and upon trade and commerce between the United States and foreign countries." *Id.* at 639.

when the market affected was outside the United States and the parties injured were not United States citizens or corporations. In *Pfizer, Inc. v. Government of India*,<sup>81</sup> the Indian government initiated an antitrust claim as a purchaser.<sup>82</sup> The Supreme Court upheld the finding of jurisdiction, holding that the requisite United States effect existed when United States corporations monopolized a foreign market, because otherwise the U.S. company "might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home."<sup>83</sup>

Assertion of jurisdiction over cases involving foreign plaintiffs affected in foreign markets resulted in the assumption of jurisdiction over cases involving relatively tenuous connections with the United States. However, courts did not automatically assert jurisdiction just because a United States citizen engaged in illegal acts. Courts required greater contacts with the United States. For example, in *Raubal v. Engelhard Minerals & Chemical Corp.*,<sup>84</sup> the court found the incorporation of one of the defendants in the United States was insufficient to assert jurisdiction. The *Raubal* plaintiffs, both citizens and residents of Austria, argued that two United States corporations and a Chilean corporation had monopolized the

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<sup>81</sup> 434 U.S. 308 (1978).

<sup>82</sup> *Id.* at 310.

<sup>83</sup> *Id.* at 315; see also *Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research & Eng'g Co.*, 1977-1 Trade Cas. (CCH) ¶ 61,256 at 70,783 (S.D.N.Y. 1977) (fact that injury occurred in a foreign country and was suffered by a foreign company that does not engage in import or export to the United States is not sufficient to deny protection of antitrust laws); *Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc.*, 383 F. Supp. 586, 587 (E.D. Pa. 1974) (*Alcoa* court focused on the consequences of the agreement, not the location of the responsible parties). But see *A.G.S. Elects., Ltd. v. B.S.R. (U.S.A.), Ltd.*, 460 F. Supp. 707, 711-12 (S.D.N.Y.) (refusal to deal had impact only on foreign consumers and foreign exporters, thus court had no jurisdiction), *aff'd*, 591 F.2d 1329 (2d Cir. 1978); *Platt Saco Lowell Ltd. v. Spindelfabrik Suessen-Schurr*, 1978-1 Trade Cas. (CCH) ¶ 61,898 at 73,774 (N.D. Ill. 1977) (antitrust laws do not protect foreigners from anticompetitive effects).

<sup>84</sup> 364 F. Supp. 1352 (S.D.N.Y. 1973).

Chilean copper industry. None of the defendants' copper was sold or shipped to the United States.<sup>85</sup> Because none of the copper was imported into the United States, the court dismissed the claim.<sup>86</sup> In contrast, in *Jospeh Muller Corp. Zurich v. Societe Anonyme de Gerance et D'Armement*,<sup>87</sup> a Swiss corporation sued a French corporation claiming both breach of contract and monopolization of the transport of various chemicals.<sup>88</sup> At the time of the suit, a Franco-Swiss treaty required that any suits between French and Swiss citizens be brought in the defendant's country.<sup>89</sup> The United States trial court held that despite the treaty, it had jurisdiction. Among the items that the court found relevant were that both the plaintiff and the defendant had offices in the United States, that many of the alleged acts took place in the United States, and that the commodities involved were shipped from the United States to other countries.<sup>90</sup> Thus although no United States companies or consumers were involved, the court found the contacts with the United States sufficient to exercise jurisdiction.<sup>91</sup>

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<sup>85</sup> *Id.* at 1356-57.

<sup>86</sup> *Id.* at 1357.

<sup>87</sup> 451 F.2d 727 (2d Cir. 1971), *cert. denied*, 406 U.S. 906 (1972).

<sup>88</sup> *Id.* at 728.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 729. The court, however, did not assert jurisdiction over the contract claims. *Id.*

<sup>91</sup> *Id.* *But cf.* *National Bank of Can. v. Interbank Card Ass'n*, 666 F.2d 6, 8 (2d Cir. 1981) (actionable aspect of restraint occurred only in foreign market, resulting in no adverse effect on United States commerce; thus, court had no jurisdiction); *Montreal Trading, Ltd. v. Amax, Inc.*, 661 F.2d 864, 870 (10th Cir. 1981) (court "could speculate that a restraint . . . [on commodities] this country imports or exports, or even uses, could have *some* effect on commerce in the United States. . . . But . . . neither the Constitution nor the Sherman Act. . . give[s] such far reaching power.") (emphasis in original); *Conservation Council of W. Austl., Inc. v. Aluminum Co. of America (Alcoa)*, 518 F. Supp. 270, 276 (W.D. Pa. 1981) ("only effects alleged . . . [were] effects on the regional resources and environmental systems of Western Australia").

C. *Attempts to Limit the Effects Test*1. *Judicial Limitations of the Effects Test*

As a result of the increasing application of the United States antitrust law to conduct which primarily affected foreign countries, it became increasingly less clear when United States antitrust laws *would not* apply. Thus while some courts continued to expand the scope of United States antitrust jurisdiction, others sought ways to limit it. For example, in an attempt to avoid the uncertainty inherent in the effects test, the Ninth Circuit advocated the use of a balancing test which considered factors of comity in deciding whether or not the federal courts should assert jurisdiction in antitrust cases involving foreign parties.<sup>92</sup> In *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*<sup>93</sup> an American partnership which imported lumber into the United States from Honduras, alleged that the Bank of America and others in the United States and Honduras conspired to prevent Timberlane from milling lumber in Honduras and exporting the lumber to the United States. The defendant argued that the government of Honduras caused the injuries Timberlane suffered.<sup>94</sup> After rejecting the act of state doctrine,<sup>95</sup> the court considered whether American law reached the conduct Timberlane alleged. The court first noted that foreign nations have sometimes resented the intrusion of the United States into conduct which the foreign governments consider within their own authority.<sup>96</sup> The court stated that "at some point the in-

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<sup>92</sup> *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1977).

<sup>93</sup> *Id.* at 601-05.

<sup>94</sup> *Id.* at 605.

<sup>95</sup> The court explained its rejection of the act of state doctrine: "Even if the *coup de grace* to Timberlane's enterprise in Honduras was applied by official authorities we do not agree that the doctrine necessarily shelters these defendants or requires dismissal of the Timberlane action." *Id.* For a discussion of the act of state doctrine, see *supra* note 48.

<sup>96</sup> *Timberlane*, 549 F.2d at 609. The court considered the relationship between the United States' need to apply its laws extraterritorially and the foreign nation's concerns:

That American law covers some conduct beyond this nation's bor-

terests of the United States are too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdiction."<sup>97</sup> The court concluded that the effects test was incomplete because it failed to consider other nations' interests.<sup>98</sup> The court then adopted a test which it deemed a "jurisdictional rule of reason."<sup>99</sup>

Disturbingly, the court concluded that "[t]he Sherman Act is not limited to trade restraints which have both a direct and substantial effect on our foreign commerce."<sup>100</sup> Rather, the court called for the application of a tripartite analysis to determine whether jurisdiction should be asserted.<sup>101</sup> The first element of the tripartite test adopted by the Ninth Circuit required that there be an actual or intended effect on American foreign commerce.<sup>102</sup> Second, the effect must be "sufficiently large [as] to present a cognizable injury to the plaintiffs . . . ." <sup>103</sup> Finally, the interest of the United States must be sufficiently strong compared to foreign interests to justify the assertion of extraterritorial jurisdiction.<sup>104</sup> The third requirement is the heart of the *Timberlane* test.

The court identified nine factors that a court must weigh in determining whether the exercise of jurisdiction

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ders does not mean that it embraces all, however. Extraterritorial application is understandably a matter of concern for the other countries involved. Those nations have sometimes resented and protested, as excessive intrusions into their own spheres, broad assertions of authority by American courts.

*Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 611-12.

<sup>99</sup> *Id.* at 613. The court's jurisdictional rule of reason is predicated on the balancing of United States interests against foreign interests. *Id.*

<sup>100</sup> *Id.* at 613.

<sup>101</sup> *Id.* at 615.

<sup>102</sup> *Id.* The court explained that "the antitrust laws require . . . that there be some effect — actual or intended — on American foreign commerce before the federal courts may legitimately exercise subject matter jurisdiction under those statutes." *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

is appropriate.<sup>105</sup> Several of the factors relate to the contacts of the parties with the United States and are actually nothing more than an elaboration of the effects test.<sup>106</sup> However, other items are controversial. For instance, the test requires that the court weigh the degree of conflict between the foreign law or policy and the United States policy, with the assumption that each nation's policy is legitimate.<sup>107</sup> The court must determine the relative importance of the policies in question to each state.<sup>108</sup>

The Third Circuit adopted a similar approach in *Mannington Mills v. Congoleum Corp.*<sup>109</sup> In *Mannington Mills*, the plaintiff alleged that Congoleum obtained patents by fraud in foreign countries and that Congoleum enforced the fraudulently obtained patents by threatening to bring suit in those countries. This practice allegedly restrained trade by restricting the ability of American competitors to use Congoleum's unpatentable designs.<sup>110</sup> The Third Circuit first noted that it had jurisdiction over acts which occur outside the United States if they "adversely and materially affect American trade . . . ."<sup>111</sup> The court found

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<sup>105</sup> The court listed the following factors:

the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance of the violations charged of conduct within the United States as compared with conduct abroad.

*Id.* at 614.

<sup>106</sup> For instance the nationality of the parties, the location of the principal place of business of a corporation, the extent of a purpose to affect American commerce and the foreseeability of the effect would be all relevant under the *Alcoa* effects test. For a discussion of the relationship between nationality, purpose and effect, see *supra* notes 63-67 and accompanying text.

<sup>107</sup> See *Timberlane*, 549 F.2d at 614-15 n.34.

<sup>108</sup> *Id.* at 615 n.34. At least one federal court has indicated that the federal courts cannot and should not weigh essentially political factors. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984). See *infra* notes 156-172 and accompanying text for a further discussion of *Laker*.

<sup>109</sup> 595 F.2d 1287 (3d Cir. 1979).

<sup>110</sup> *Id.* at 1290.

<sup>111</sup> *Id.* at 1291. The *Mannington Mills* court noted: "[T]he Supreme Court has

that exclusion of an American firm from competition in a foreign country adversely affects United States interests; thus, the court had jurisdiction to hear the case.<sup>112</sup> The court concluded, however, that the inquiry should not stop there when foreign nations are involved.<sup>113</sup> The court set out to determine whether it was appropriate to exercise its jurisdiction, based on considerations of comity and foreign policy. The court set forth ten considerations which it concluded should be balanced to decide whether or not to assert jurisdiction.<sup>114</sup> The dissent rejected the majority's comity approach and argued that the court could not choose to abstain if it had jurisdiction.<sup>115</sup>

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made it clear that 'foreign commerce' applies to importing, exporting and other commercial transactions, as well as *transportation* and communication between the United States and a foreign country." *Id.* (footnote omitted) (emphasis added).

<sup>112</sup> *Id.* at 1296. The *Timberlane* court's approach and the *Mannington Mills* court's approaches are analytically distinct. In *Timberlane* the comity test was part of the analysis required to determine if the court had jurisdiction. In *Mannington Mills* the comity test was used to determine whether the court should exercise its jurisdiction. The *Mannington Mills* approach was used by the Seventh Circuit in *In re Uranium Antitrust Litig.*, 617 F.2d 1248 (7th Cir. 1980). The three factors that the *Uranium Antitrust* court concluded justified the exercise of jurisdiction were the complexity of the case, the seriousness of the charges, and the attitude of the defaulting plaintiffs toward the litigation. 617 F.2d at 1255.

<sup>113</sup> The court explained that if a United States firm were "excluded from competition . . . by fraudulent conduct . . . [i]n a purely domestic situation, the right to a remedy would be clear." *Mannington Mills*, 595 F.2d at 1296.

<sup>114</sup> The *Mannington Mills* factors are even more politically oriented than the *Timberlane* factors. The ten factors are:

1. Degree of conflict with foreign law or policy; 2. Nationality of the parties; 3. Relative importance of the alleged violation of conduct here compared to that abroad; 4. Availability of a remedy abroad and the pendency of litigation there; 5. Existence of intent to harm or affect American commerce and its foreseeability; 6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief; 7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; 8. Whether the court can make its order effective; 9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; 10. Whether a treaty with the affected nations has addressed the issue.

*Id.* at 1297-98 (footnote omitted).

<sup>115</sup> The dissent argued that absent an accepted abstention doctrine, a court may not decline to exercise its jurisdiction. According to the dissent, because international comity is not an abstention doctrine, if the court determined it had jurisdiction it could not dismiss the case. *Id.* at 1301-02 n.9; see also *Industrial Inv. Dev.*



The dissent further pointed out that even if abstention were legitimate, comity would be a significant consideration only when the foreign law required conduct inconsistent with the conduct required by the Sherman Act.<sup>116</sup>

## 2. Congressional Limitations of the Effects Test

In an attempt to limit the reach of the antitrust laws and to clarify the jurisdictional standard, Congress enacted the Foreign Trade Antitrust Improvements Act of 1982.<sup>117</sup> The Act had two effects: the limitation of the

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Corp. v. Mitsui & Co., 671 F.2d 876, 884-85 n.7 (5th Cir. 1982) (questioning whether the trial court may exercise discretion in choosing not to apply the antitrust laws), *vacated on other grounds*, 460 U.S. 1007 (1983). For a further discussion of the validity of international comity as a basis for dismissal, see *infra* notes 134-174 and accompanying text.

<sup>116</sup> *Mannington Mills*, 595 F.2d at 1302. The dissent seemed worried that because the foreign country's policy was different, a federal court might dismiss on the basis of comity. There is clearly a distinction between inconsistent policies and merely different policies. If policies conflict, a defendant cannot comply with both the foreign requirement and the United States requirement. On the other hand, if the policies are merely different, he could comply with both. There seems to be some grounds for the dissent's concern. See, e.g., *Timberlane Lumber Co. v. Bank of Am. N.T. & S.A.*, 749 F.2d 1378 (9th Cir. 1984) (appeal of district court's application of comity analysis on remand). The appellate court concluded that although the district court had reached the correct conclusion, it had applied the test incorrectly. *Timberlane II*, 749 F.2d at 1383. The Ninth Circuit noted that Honduran law allowed competitors to allocate territories, fix prices and limit output. United States law prohibits these practices. The Ninth Circuit noted that in some cases this type of conflict alone would be sufficient to allow a court to decline jurisdiction. *Id.* at 1384. However, Honduran law did not actually require conduct forbidden by the United States. Thus there is no possibility that the defendant could be found to have violated Honduran laws by complying with United States laws.

<sup>117</sup> Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, Title IV, §§ 401-403, 96 Stat. 1246 (codified at 15 U.S.C. § 6a (1982)). In relevant part the statute reads:

[T]his Act shall not apply to conduct involving trade or import commerce (other than import trade or import commerce) with foreign nations unless — (1) such conduct has a direct, substantial, and reasonably foreseeable effect — (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; . . . If this Act applies . . . only because of the operation of paragraph (1)(B), then . . . this Act shall apply to such conduct only for injury to export business in the United States.

ability of plaintiffs to redress anticompetitive practices occurring outside of the United States through the United States judicial system, and the immunization of United States exporters from liability for antitrust violations affecting only foreign consumers and competitors.<sup>118</sup> Congress indicated that foreign citizens should be protected by United States antitrust laws when they participate in the United States markets.<sup>119</sup> However, when effects do not occur in the United States, Congress believed that justice is best served by requiring the plaintiff to seek redress in his home country.<sup>120</sup>

The Foreign Trade Antitrust Improvements Act also clarified the standard to be applied in evaluating when an effect on the United States is sufficient to warrant federal jurisdiction. The Act provides that the Sherman Act does not "apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless — (1) such conduct has a direct, substantial, and reasonably foreseeable effect" on United States commerce or on the business of a person engaged in exporting from the United States to foreign nations.<sup>121</sup> Two aspects of the statute are noteworthy. First, the "direct, substantial, and reasonably foreseeable" standard does not apply to anticompetitive acts which affect imports.<sup>122</sup> Presumably if a foreign defendant is accused of restricting

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*Id.*

<sup>118</sup> See H.R. REP. NO. 686, 97th Cong., 2d Sess. 1, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 2487 [hereinafter COMMITTEE REPORT]. For cases illustrating these effects, see *infra* note 125.

<sup>119</sup> *Id.* at 10, 1982 U.S. CODE CONG. & ADMIN. NEWS at 2495. "Foreign purchasers should enjoy the protection of our antitrust laws in the domestic marketplace, just as our citizens do." *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> 15 U.S.C. § 6a (1982).

<sup>122</sup> The introductory clause indicates that § 6a does not cover import trade or commerce. *Id.* It is unclear whether anticompetitive acts directed at international flights entering the United States would be subject to the direct, substantial, and reasonably foreseeable effect standard. It could be argued that air traffic entering the United States is in the nature of an import and thus the plaintiff need only show an effect rather than a direct, substantial and reasonably foreseeable effect to survive the jurisdictional challenge.

the imports of the United States, the effect required for application of the antitrust laws is less substantial.<sup>123</sup> Second, the statute eliminates the requirement of intent to harm the United States.<sup>124</sup> Even an unintended effect will give rise to liability so long as the effect is foreseeable.

Cases decided under the Foreign Trade Antitrust Improvements Act of 1982 bear out the theory that the Act made access to the federal courts for antitrust violations abroad more difficult.<sup>125</sup> The Southern District of New York explained the Act in *Eurim-Pharm GmbH v. Pfizer, Inc.*:<sup>126</sup>

The amendment clearly was intended to exempt from United States antitrust law conduct that lacks the requisite domestic effect, even where such conduct originates in the

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<sup>123</sup> Antitrust Guidelines for International Operations, 53 Fed. Reg. 21,595 (1988) (proposed June 8, 1988).

<sup>124</sup> See 15 U.S.C. § 6a (1982). Congress indicated that the reasonably foreseeable standard is the substitute for an intent requirement. Congress chose to require reasonable foreseeability rather than intent because Congress wanted "to make the standard an objective one and to avoid-at least at the jurisdictional stage-inquiries into the actual, subjective motives of defendants." COMMITTEE REPORT, *supra* note 118, at 9, 1982 U.S. CODE CONG. & ADMIN. NEWS at 2494. The Committee noted that "[a]n intent test might encourage ignorance of the consequences of one's actions, which in this context, would be an undesirable result." *Id.*

<sup>125</sup> See, e.g., *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348 (1986) (plaintiff was unable to recover antitrust damages based solely on cartelization of Japanese market); *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 813-15 (9th Cir. 1988) (antitrust claim concerning refusal to deal in foreign trade not within court's subject matter jurisdiction); *'In' Porters, S.A. v. Hanes Printables, Inc.*, 663 F. Supp. 494 (M.D.N.C. 1987) (foreign company that demonstrated an effect on United States export trade but that was not a United States exporter itself lacked jurisdictional basis for claim); *Papst Motoren GmbH & Co. v. Kanematsu-Goshu (U.S.A.), Inc.*, 629 F. Supp. 864 (S.D.N.Y. 1986) (effects of allegedly illegal act occurred only in Japan; thus court lacked jurisdiction); *Liamuiga Tours v. Travel Impressions Ltd.*, 617 F. Supp. 920 (E.D.N.Y. 1985) (although some allegedly illegal conduct was committed in the United States by a United States corporation, court lacked jurisdiction because effects of conduct were felt only in St. Kitts); *Power E., Ltd. v. Transamerica Deleval Inc.*, 558 F. Supp. 47 (S.D.N.Y.) (although plaintiff's principal shareholder was a United States citizen and defendant was a United States corporation, court did not have jurisdiction because plaintiff was excluded from a market outside the United States), *aff'd*, 742 F.2d 1439 (2d Cir. 1983).

<sup>126</sup> 593 F. Supp. 1102 (S.D.N.Y. 1984).

United States or involves American-owned entities operating abroad.

Section 7 does not, however, preclude all persons or entities injured abroad from recovering under United States antitrust laws. When the activity complained of has a demonstrable effect on United States domestic or import commerce, foreign corporations injured abroad may seek recovery under the Sherman Act.<sup>127</sup>

The *Eurim-Pharm* court found it lacked jurisdiction because the plaintiff could not show any link between Pfizer's allegedly illegal conduct in Europe and United States commerce.<sup>128</sup>

The Foreign Trade Antitrust Improvements Act of 1982 limited the class of foreign plaintiffs who have access to the United States courts and limited the extent of antitrust liability for American businesses operating abroad.<sup>129</sup> Thus the Act is in no way responsive to foreign governments' concerns that the United States antitrust laws are overly broad. If anything, the Act makes the extraterritorial application of United States antitrust laws seem even more unfair because as far as United States imports go, a court would have jurisdiction over a foreign defendant whose activities did not give rise to "direct, substantial, and reasonably foreseeable effects on the United States."

Further, the Act does not in any way mention consideration of comity as an element of the jurisdictional decision.<sup>130</sup> The legislative history of the Act indicates that courts would be able to "employ notions of comity, or

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<sup>127</sup> *Id.* at 1106 (footnote omitted).

<sup>128</sup> *Id.*

<sup>129</sup> See *supra* note 125 and accompanying text for examples of recent cases in which the United States refused to assert jurisdiction.

<sup>130</sup> See Murphy, *Moderating Antitrust Subject Matter Jurisdiction: The Foreign Trade Antitrust Improvements Act and the Restatement of Foreign Relations Law (Revised)*, 54 U. CIN. L. REV. 779, 813 (1986). The Murphy article discusses the Foreign Trade Antitrust Improvements Act of 1982 extensively in comparison to the Restatement of Foreign Relations (Revised). Since the date of Murphy's article the Restatement has been revised further resulting in the publication the Restatement (Third). See *infra* notes 175-184 and accompanying text for a discussion of the Third Restatement's antitrust provisions.

otherwise to take account of the international character of the transaction."<sup>131</sup> Congress' failure to explicitly require balancing of United States interests against foreign interests tends to indicate that Congress did not consider the comity analysis essential in every case.<sup>132</sup>

### III. RECENT CRITICISMS OF THE COMITY ANALYSIS

#### A. Commentators' Criticisms

While the Foreign Trade Antitrust Improvements Act clarified the jurisdictional standard for cases involving plaintiffs affected in foreign markets, the general body of extraterritorial antitrust jurisdiction law still applies in a great number of cases. The comity analysis of *Timberlane* is thus not dead, although some commentators urge that it should be.<sup>133</sup> One interesting argument is that *Timberlane* requires unauthorized judicial abstention.<sup>134</sup> The Supreme Court has indicated that absent a recognized ground for abstention, a federal court may not decline to exercise its jurisdiction.<sup>135</sup> Each of the currently recognized abstention doctrines is based on the relation-

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<sup>131</sup> COMMITTEE REPORT, *supra* note 118, at 13, 1982 U. S. CODE CONG. & ADMIN. NEWS at 2498 (citation omitted).

<sup>132</sup> Murphy, *supra* note 130, at 813.

<sup>133</sup> Interestingly, although the Justice Department will consider comity in deciding whether to prosecute a criminal antitrust action, see *supra* note 76, the Justice Department believes judicial dismissal on the basis of comity factors is inappropriate in criminal actions. Antitrust Guidelines for International Operations, 53 Fed. Reg. 21,595 n.112 (1988). Further, the Justice Department believes that even where the judiciary is justified in conducting a comity analysis, the effect of antitrust suits on foreign relations cannot be considered. To do so infringes upon the executive branch's function. *Id.* at 21,596 n.115. For a discussion of the political question implications of comity analysis, see *infra* notes 142-144 and accompanying text.

<sup>134</sup> See, e.g., *Mannington Mills*, 595 F.2d at 1301-02 n.9 (dissent); *Industrial Inv. Dev. Corp.*, 671 F.2d 884-85 n.7; Sennett & Gavil, *Antitrust Jurisdiction, Extraterritorial Conduct and Interest-Balancing*, 19 INT'L LAW. 1185, 1210 (1985); Rahl, *International Application of American Antitrust Laws: Issues and Proposals*, 2 NW. J. INT'L L. & BUS. 336, 363 (1980).

<sup>135</sup> *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). In the *Cohens* case, Chief Justice Marshall stated: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." *Id.*

ship of the federal government to the individual states.<sup>136</sup> Situations involving foreign governments obviously do not raise the same concerns of federalism. Moreover, traditional abstention doctrines do not deprive a plaintiff of a vested cause of action.<sup>137</sup> For both of these reasons, comity-based abstention would seem improper.

One response to this criticism has been to suggest that the requirement of an effect on foreign commerce is not a jurisdictional requirement at all.<sup>138</sup> According to this view, federal courts are authorized to hear antitrust cases under 28 U.S.C. § 1337,<sup>139</sup> whether or not the claimed antitrust violation affects the United States. The requirement that the plaintiff demonstrate an effect on United States commerce is a substantive element of the claim according to this view.<sup>140</sup> In that case, if a court decides to dismiss a case based on considerations of comity, it is because the plaintiff had failed to state a claim; thus, no question of abstention arises.

This response may be appealing because it legitimizes consideration of foreign interests in deciding whether a case should proceed. However, this approach raises similar concerns. It is doubtful that Congress could give federal courts jurisdiction over antitrust claims that did not

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<sup>136</sup> C. WRIGHT, *THE LAW OF FEDERAL COURTS* § 52 (4th ed. 1982). The four recognized bases are: (1) to avoid decision of constitutional questions when state law can decide the case; (2) to prevent conflict between the state and federal government in the decision of state matters; (3) to allow the states to resolve unsettled issues in their own law; and (4) to prevent duplication of effort between state and federal courts. *Id.*

<sup>137</sup> P. BARLOW, *supra* note 7, at 113-14. As a rule, alternative relief must be available to justify abstention. *Id.* at 113. A plaintiff in an antitrust action often will not have foreign remedies available because many foreign countries do not prohibit anticompetitive conduct. *Id.* Thus abstention in antitrust actions raises due process concerns. *Id.* at 113 n.175.

<sup>138</sup> P. AREEDA & H. HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES & THEIR APPLICATION* ¶ 237 (Supp. 1986); see *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1161, 1171-72 n.21 (E.D. Pa. 1980).

<sup>139</sup> 28 U.S.C. § 1337(a) (1982). This section provides in part: "The district court shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. . . ." *Id.*

<sup>140</sup> P. AREEDA & H. HOVENKAMP, *supra* note 138, at ¶ 237.

have at least a de minimis effect on the United States.<sup>141</sup> Federal courts would be required to find at least a de minimis effect on the United States to assert jurisdiction. The question of the validity of abstention would thus arise once more.

A further criticism of comity analysis is that courts must consider questions of foreign relations usually left to the Department of State and other arms of the executive branch.<sup>142</sup> Under the political question doctrine, issues committed to coordinate branches of government are non-justiciable.<sup>143</sup> If we accept the view that comity is an essential consideration in cases involving foreign parties, antitrust cases could be found to raise political questions because they require a judicial determination of the weight to be accorded to foreign interests.<sup>144</sup>

The final theoretical problem with comity analysis is that, as a rule, it deprives a plaintiff of any possibility of obtaining relief. Comity analysis adopts a choice of law approach to decide whether to assert jurisdiction.<sup>145</sup> However, choice of law analysis is not a vehicle to decide whether to hear a case. Rather, as its name implies, choice of law analysis is used to determine whether the law of the forum or some other jurisdiction will control.<sup>146</sup> A true choice of law analysis, it is true, might sometimes end in the decision that United States law does not apply. The result, however, would not be dismissal. Instead, the law of some other jurisdiction would apply.

Requiring courts to consider questions of comity also

<sup>141</sup> The United States Constitution gives Congress the power "[t]o regulate Commerce with foreign Nations." U.S. CONST. art. I, § 8, cl. 3. Arguably if there is no effect on the United States, Congress is not regulating commerce with foreign nations but rather *among* foreign nations.

<sup>142</sup> 1 W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS § 2.15 (3d ed. 1982).

<sup>143</sup> *Baker v. Carr*, 369 U.S. 186, 210 (1962). For a discussion of the political question implications of comity based dismissal, see Sennett & Gavil, *supra* note 134, at 1210.

<sup>144</sup> See Sennett & Gavil, *supra* note 134, at 1210-11.

<sup>145</sup> P. BARLOW, *supra* note 7, at 111.

<sup>146</sup> *Id.* at 121.

raises practical problems. Among those most frequently cited is the difficulty of weighing the interests of foreign nations.<sup>147</sup> The court must operate within the constraints of the adversary system. One of the problems with trying to weigh the interests of a non-party foreign government is that the views of the government will be presented by the party attempting to avoid jurisdiction.<sup>148</sup> Thus, it is likely that some foreign interests will be given more importance than the foreign government itself would accord the policy at issue.

The judicial context is not the best context in which to make foreign policy decisions.<sup>149</sup> Even executive agencies with much greater resources at hand often find it difficult to accurately weigh foreign interests. Given that the subject matter jurisdiction determination will generally occur early in the proceedings and that the information upon which the court could base its evaluation of the interests of the foreign government will be limited, it is unlikely that foreign interests could be sufficiently protected.

Further, it is not at all clear that a comity analysis is necessary. The *Timberlane* test would allow United States courts to exercise jurisdiction over claims involving foreign parties, even if there was no substantial impact on the United States, as long as no other nation's interests were adversely affected.<sup>150</sup> But the question arises whether Congress intended the antitrust laws to remedy such situations. Conversely, it is difficult to imagine a situation involving substantial harm to United States commerce in which a United States court would be willing to conclude that United States interests were outweighed by

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<sup>147</sup> Rahl, *supra* note 134, at 363. The ability of United States courts to weigh the interests of foreign nations was one of the *Laker* court's primary concerns. *Laker*, 731 F.2d at 948-53.

<sup>148</sup> Sennett & Gavil, *supra* note 134, at 1211. Sennett & Gavil note that the United States and the foreign government involved might be asked to appear, but that problems could develop if one or both parties did not appear: *Id.*

<sup>149</sup> P. BARLOW, *supra* note 7, at 119 (comity approach "reduces extraterritorial subject matter jurisdiction to a question of politics . . . a task which the courts are ill suited to perform").

<sup>150</sup> *Id.*



a foreign country's interest in allowing the practice to continue.

Finally, other factors tend to diminish the importance of the comity analysis.<sup>151</sup> First, unless a foreign defendant has significant contacts with the United States, a court will be unable to obtain personal jurisdiction over the defendant.<sup>152</sup> If, for example, airlines which do not fly into the United States or have any other operations in the United States conspire to restrain routes entirely outside the United States, it is unlikely that a United States court would have personal jurisdiction. Second, air service treaties could be negotiated to prevent the application of the United States antitrust laws.<sup>153</sup> Third, in recent years the European Economic Community and Germany have expanded the extraterritorial application of their antitrust laws.<sup>154</sup> Thus, it is likely that the practice of asserting extraterritorial antitrust jurisdiction will become less unusual in the international community.<sup>155</sup>

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<sup>151</sup> P. AREEDA & H. HOVENKAMP, *supra* note 138, at ¶ 232.1. Areeda and Hovenkamp characterize the entire process as a "molehill inflated into a mountain." *Id.* at ¶ 232.1e.

<sup>152</sup> Kintner & Griffin, *Jurisdiction over Foreign Commerce Under the Sherman Antitrust Act*, 18 B.C. INDUS. & COM. L. REV. 199, 225 (1977). For a thorough discussion of personal jurisdiction, venue and service of process concepts as they are likely to apply to international aviation antitrust cases, see P. BARLOW, *supra* note 7, at 70-88. Barlow concludes that if an airline maintains an agent in the United States personal jurisdiction is almost inevitable. *Id.* at 88. Recent cases, however, suggest that foreign parties may be entitled to special deference in assessing the fairness of personal jurisdiction. *Asahi Metal Ind. Co. v. Superior Court*, 107 S. Ct. 1026 (1987) (plurality opinion) (court should carefully inquire into reasonableness of jurisdiction where a foreign defendant is involved); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 460 U.S. 408 (1984) (to establish personal jurisdiction in suits that do not arise out of contacts with the United States, activity in United States must be continuous and systematic).

<sup>153</sup> Kintner & Griffin, *supra* note 152, at 225-26.

<sup>154</sup> *Id.* at 225. For an analysis of the extraterritorial application of Germany's antitrust laws, see Gerber, *The Extraterritorial Application of the German Antitrust Laws*, 77 AM. J. INT'L L. 756 (1983) (arguing that Germany has avoided international conflict by limiting jurisdiction to those cases having substantial and direct effects in Germany).

<sup>155</sup> The fact that other governments exercise broad extraterritorial jurisdiction may not stifle foreign outcry against extraterritorial application of United States antitrust laws. The British reaction in *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984) could recur. See *infra* notes 156-

## B. *Judicial Decisions Criticizing Comity*

At least one federal court has reacted to criticism of comity analysis by abandoning comity as a consideration.<sup>156</sup> The *Laker* litigation caused considerable tension between the United States and Great Britain in the executive and judicial branches of both countries.<sup>157</sup> Laker alleged that a number of international air carriers conspired to drive him out of business by engaging in predatory pricing on flights to and from the United States. Laker instituted an antitrust action in the United States federal court based on these alleged violations.<sup>158</sup> The foreign defendants obtained an injunction in Britain, preventing Laker from proceeding with his actions against them.<sup>159</sup> Laker then filed a second suit against KLM and Sabena Belgian World Airways. The district court granted a preliminary injunction preventing KLM, Sabena, and the U.S. defendants from invoking the jurisdiction of foreign courts to prevent the adjudication of the dispute in the United States.<sup>160</sup> The British court subsequently dissolved its antisuit injunction in the first action because it concluded that application of the United States antitrust laws did not violate British sovereignty.<sup>161</sup> The British Secretary of State for Trade and Industry, however, concluded that the action threatened British trading interests, and prohibited entities carrying on business in the United

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172 for a discussion of *Laker*. However, foreign governments will no longer be able to assert that the United States is unique in its imposition upon foreign defendants.

<sup>156</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984). For an excellent discussion of the *Laker* litigation see Rogers, *Still Running Against the Wind: A Comment on Antitrust Jurisdiction and Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 50 J. AIR L. & COM. 931 (1985).

<sup>157</sup> See articles cited *supra* note 13 for contemporaneous reports of the problems.

<sup>158</sup> *Laker*, 731 F.2d at 917. The defendants in the action were Pan American World Airways, Trans World Airlines, McDonnell Douglas, McDonnell Douglas Finance, British World Airways, British Caledonian, Lufthansa, and Swissair. *Id.*

<sup>159</sup> *Id.* at 918.

<sup>160</sup> *Id.* at 918-19. The injunction was necessary to preserve the jurisdiction of the district court. *Id.* at 929-30.

<sup>161</sup> *Id.* at 919.

Kingdom from cooperating with any orders arising out of Laker's antitrust action in the United States.<sup>162</sup> The British Court of Appeal upheld the order and enjoined Laker from taking any further action against British airlines in the United States antitrust litigation.<sup>163</sup> KLM and Sabena then appealed the United States district court's injunction, claiming that it prevented them from exercising their right of access to foreign courts.<sup>164</sup>

On appeal, the D.C. Circuit upheld the district court's antisuit injunction. In upholding the injunction, the D.C. Circuit discussed the extraterritorial application of the antitrust laws at length. The court concluded that the jurisdiction of the United States was clear under the facts of the *Laker* cases.<sup>165</sup> The court noted that the greatest impact of predatory pricing on international routes between Europe and the United States would be on American consumers.<sup>166</sup> The court further found that the actions of the conspirators destroyed Laker's ability to pay his American creditors.<sup>167</sup> The court finally noted that landing rights served as permits to do business, and that by accepting the landing rights the foreign airlines subjected themselves to United States antitrust law.<sup>168</sup>

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<sup>162</sup> *Id.* at 920. The determination was made and the order was entered under the authority of the Protection of Trading Interests Act, 1980, ch. 11. *Id.* The Protection of Trading Interests Act is a blocking statute which contains discovery limiting provisions and clawback provisions. See *supra* notes 14-15.

<sup>163</sup> *Laker*, 731 F.2d at 920.

<sup>164</sup> *Id.* at 921.

<sup>165</sup> *Id.* at 953.

<sup>166</sup> *Id.* at 923-24. The court noted: "The greatest impact of a predatory pricing conspiracy would be to raise fares for United States passengers. No other single nation has nearly the same interest in consumer protection on the particular combination of routes involved in Laker's antitrust claims." *Id.* at 924.

<sup>167</sup> *Id.* at 924. The court concluded that the creditor's claims were an even more direct United States interest than the consumer interests that Laker's action would protect. *Id.* at 924-25.

<sup>168</sup> *Id.* at 924-25. The court explained: "The landing rights granted to appellants are permits to do business in this country. Foreign airlines fly in the United States on the prerequisite of obeying United States law." *Id.* (citation omitted). The court further noted that the purpose of regulation was to place foreign airlines on equal footing with United States airlines; otherwise, United States airlines would be at a competitive disadvantage because United States citizens could enforce laws against United States carriers but not foreign carriers. *Id.* at 925. Fi-

The court rejected the argument that considerations of comity dictated that the court should not exercise jurisdiction. The court noted that federal courts should not be asked to conduct an interest balancing inquiry because courts are unqualified to balance factors which are essentially political considerations.<sup>169</sup> The court urged that the executive and legislative branches resolve the basic issues which led to conflicting assertions of jurisdiction.<sup>170</sup> The court concluded that even if judges were competent to balance the delicate political issues raised by conflicting assertions of jurisdiction, courts probably could not remain neutral toward both the United States' policy and the foreign country's policy.<sup>171</sup> The court finally pointed out that the Sherman Act is mandatory United States law and that the judiciary cannot abandon its jurisdiction when applying mandatory law.<sup>172</sup>

The *Laker* litigation clearly demonstrates the problems of applying United States antitrust laws to aviation. By definition, a foreign nation will have a significant interest in any case involving international aviation. Although the United States views competition as the preferred form of economic conduct, many nations do not believe free competition is desirable in aviation.

Of course, in some cases United States courts probably do not have jurisdiction. For example, if a group of foreign carriers combined to exclude an American carrier from an entirely foreign market, a United States court probably should not hear the case. While it could be ar-

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nally, the court noted that the foreign airlines enjoyed the protection of the United States antitrust laws and that therefore they should be subject to them. *Id.*

<sup>169</sup> *Id.* at 948. The court concluded that the conflict was not caused by the authority of the courts in the two countries but rather by the different national policies toward anticompetitive activities. *Id.* at 945. Thus the court concluded that the courts of each nation could not accommodate the policy of the other country and remain faithful to the laws of its own country. *Id.* at 948.

<sup>170</sup> *Id.* at 955.

<sup>171</sup> *Id.* at 951. "When push comes to shove, the domestic forum is rarely unseated . . . . [C]ourts inherently find it difficult neutrally to balance competing foreign interests. When there is any doubt, national interests will tend to be favored over foreign interests." *Id.* (footnotes omitted).

<sup>172</sup> *Id.* at 953-54.

gued that United States consumers and competitors who transacted business in such a market might be injured, surely the United States antitrust laws were not intended to force American economic beliefs on the world.

When the United States has a legitimate interest in promoting its economic values, *Timberlane* breaks down. Assume, for example, that as part of a plan to increase tourism by Americans, a foreign government encourages, but does not require, private carriers incorporated in that country to engage in cooperative below cost price setting for routes between that country and the United States.<sup>173</sup> Both the United States and the foreign nation would have significant interests in such a situation. United States courts should not be required to hold American economic aims subservient to foreign economic aims merely because the foreign country does not accept American economic values. *Timberlane* and its progeny give critical weight to the degree of conflict between United States and foreign policies. In doing so they tend to undervalue American policy.<sup>174</sup>

#### IV. ALTERNATIVES TO THE COMITY ANALYSIS

##### A. *Restatement of Foreign Relations (Third) Approach*

The Restatement of Foreign Relations (Third) devotes a section specifically to the application of the United States antitrust laws.<sup>175</sup> The Restatement divides antitrust

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<sup>173</sup> Foreign sovereign immunity would not apply in this situation because the government does not own the airlines in this hypothetical. The sovereign compulsion doctrine also would not apply because the government does not require participation. For a discussion of foreign sovereign immunity and the sovereign compulsion doctrine see *supra* note 48.

<sup>174</sup> See P. BARLOW, *supra* note 7, at 127-28:

In the context of international air transportation, . . . many of [the comity] factors are inappropriate to the determination of whether subject matter jurisdiction exists. In the final analysis, the outcome would depend on a subjective assessment by either the court, or the court acting upon executive advice, of political and possibly aviation rather than antitrust considerations.

*Id.*

<sup>175</sup> RESTATEMENT, *supra* note 41, § 415. The Restatement provides:

violations into three categories.<sup>176</sup> The first category consists of cases in which acts restraining trade are carried out in the United States. According to the Restatement, the United States has jurisdiction in these cases regardless of the parties' nationality or place of business.<sup>177</sup> Under the Restatement, the United States can proscribe conduct which has no effect whatsoever in the United States as long as some of the conduct necessary to carry out the restraint occurs in the United States. Such an assertion of United States jurisdiction does not seem appropriate in light of the fact that the Antitrust Improvements Act of 1982 indicates a clear Congressional intent to extend the protection of the antitrust laws primarily to United States consumers and competitors.<sup>178</sup> Federal courts could be required to hear numerous foreign claims to decide whether a substantial amount of the conduct in restraint of trade had occurred in the United States. This provision would strain judicial resources.

The second category of cases under the Restatement are those that involve acts in restraint of trade occurring outside the United States, which are intended to interfere

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(1) Any agreement in restraint of United States trade that is made in the United States, and any conduct or agreement in restraint of such trade that is carried out in significant measure in the United States, are subject to the jurisdiction to proscribe of the United States, regardless of the nationality or place of business of the parties to the agreement or of the participants in the conduct. (2) Any agreement in restraint of United States trade that is made outside of the United States, and any conduct or agreement in restraint of such trade that is carried out predominantly outside of the United States, are subject to the jurisdiction to proscribe of the United States, if a principal purpose of the conduct or agreement is to interfere with the commerce of United States, and the agreement or conduct has some effect on that commerce. (3) Other agreements or conduct in restraint of United States trade are subject to the jurisdiction to proscribe of the United States if such agreements or conduct have substantial effect on the commerce of the United States and the exercise of jurisdiction is not unreasonable.

*Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> See *supra* notes 117-132 and accompanying text for a discussion of the purpose of the Antitrust Improvements Act of 1982.

with United States commerce, and which have some effect on United States commerce.<sup>179</sup> This section essentially parallels the *Alcoa* effects test. It is subject to the same problem that the *Alcoa* test is subject to: it allows assertion of jurisdiction on the basis of a de minimis effect on United States commerce.<sup>180</sup> Clearly such an exercise of jurisdiction based on a de minimis effect would be too broad, not just because the interests of the foreign nations involved would presumably be greater than the United States interests, but also because in most cases any small effect on the United States markets would be indirect.

The final category under the Restatement involves other conduct which has substantial effects on United States commerce.<sup>181</sup> This category thus includes conduct not intended to affect the United States but which does affect the United States, and conduct which is intended to affect the United States but which does not succeed. The Restatement would allow exercise of jurisdiction only if it were reasonable for the United States to exercise jurisdiction.<sup>182</sup> The Restatement sets out the elements which are to be considered in deciding whether jurisdiction is rea-

<sup>179</sup> RESTATEMENT, *supra* note 41, § 415(2). For text, see *supra* note 175.

<sup>180</sup> See *supra* notes 71-91 and accompanying text for a discussion of the problems that arose as a result of the expansion of the effects test.

<sup>181</sup> RESTATEMENT, *supra* note 41, § 415(3). For text, see *supra* note 175.

<sup>182</sup> RESTATEMENT, *supra* note 41, § 415(3). The Restatement lists a number of factors which must be evaluated in deciding whether to exercise jurisdiction in these cases. These factors include:

(a) the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect; (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (d) the existence of justified expectations that might be protected or hurt by the regulation; (e) the importance of the regulation to the international political, legal, or economic system; (f) the extent to which the regulation is consistent with the traditions of the international system; (g) the extent to which another

sonable in Section 403.<sup>183</sup> The basic problem with these considerations is that they parallel the *Timberlane* considerations. Thus they are subject to the same procedural, constitutional, and practical limitations as other types of comity analysis.<sup>184</sup>

### B. *Accommodation of the Substantive Law to Foreign Parties*

At least part of the reason that foreign governments do not approve of United States antitrust law is that it involves concepts unknown to their judicial systems. Two frequently cited examples are per se liability and treble damages. Some problems could be alleviated by the adoption of different substantive rules for extraterritorial cases.<sup>185</sup> For example, it might be appropriate to eliminate per se condemnation of restraints occurring in foreign commerce.<sup>186</sup> This would enable courts to consider market conditions in the relevant foreign country which might make the restraint in issue reasonable, while allowing them to condemn those restraints that served no purpose other than the elimination of competition.<sup>187</sup>

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state may have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by another state.

*Id.* § 403(2).

<sup>183</sup> *Id.*

<sup>184</sup> See *supra* notes 134-172 for a discussion of the flaws of the *Timberlane* comity analysis. Several commentators have suggested approaches that in some way involve interest balancing. See, e.g., Grossfeld & Rogers, *A Shared Values Approach to Jurisdictional Conflicts in International Economic Law*, 32 INT'L & COMP. L.Q. 931 (1983) (suggesting extraterritorial application of laws based on shared values); Ongman, "Be No Longer A Chaos": *Constructing a Normative Theory of the Sherman Act's Extraterritorial Jurisdictional Scope*, 71 Nw. U. L. REV. 733 (1977) (suggesting a three stage analysis ultimately focusing on "accommodation of multistate interstate interests").

<sup>185</sup> 1 P. AREEDA & D. TURNER, *supra* note 33, at ¶ 237.

<sup>186</sup> *Id.* The Justice Department, for instance, in the past advocated a broader use of the rule of reason in the international context. ANTITRUST DIV., U.S. DEP'T JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (1977). The revised draft of the Guide omits this suggestion.

<sup>187</sup> 1 P. AREEDA & D. TURNER, *supra* note 33, at ¶ 237. Areeda & Turner note: "To say that domestic per se rules are not necessarily and automatically applicable in the international context is not to say that an antitrust court needs to hesitate very long before condemning restraints. . . without any plausible purpose other than the suppression of competition with and in the United States." *Id.*



This suggestion has some merit. The rationale for per se rules in antitrust analysis is that courts have sufficient experience with certain restraints to decide immediately that the conduct involved is anticompetitive.<sup>188</sup> However, in the foreign context, courts may be unfamiliar with market conditions that require the parties to engage in conduct generally considered anticompetitive. Rejection of conventional assumptions, however, does not solve the basic problem. A court might conclude that it had jurisdiction in a case which affected United States trade or commerce only incidentally, examine all the factors asserted to justify the restraint, and find the restraint unreasonable. Surely the foreign governments involved would object in such a case, despite the fact that the per se rule had not been applied.

### C. *Pending Legislation*

Given the chaotic and uncertain state of the law, the most efficient means of deciding whether the jurisdiction of the federal courts reaches foreign parties would be to amend the antitrust laws. One such amendment is currently pending in Congress.<sup>189</sup> The bill provides that federal courts must hear motions to dismiss for lack of subject matter jurisdiction before other proceedings are conducted.<sup>190</sup> The purpose of the provision is to prevent exhaustive pretrial discovery only to find that the court lacks jurisdiction.<sup>191</sup> While early rulings on subject matter jurisdiction may be practical in some cases, early rulings

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<sup>188</sup> H. HOVENKAMP, *ECONOMICS & FEDERAL ANTITRUST LAW* 126-27 (1985).

<sup>189</sup> S. 572, 100th Cong., 1st Sess., 133 CONG. REC. S2292 (daily ed. Feb. 19, 1987).

<sup>190</sup> *Id.* The bill provides:

Whenever a motion to dismiss for lack of subject matter jurisdiction under this section is made, the court shall, except for good cause shown, hear and determine such motion, after such discovery or other proceedings directly related to the motion, as the court deems appropriate, before conducting or permitting the parties to conduct any further [sic] proceedings in the action.

*Id.* at S2293.

<sup>191</sup> *Id.* at S2296.

will often be impractical. In the international aviation setting for example, restraints of trade are likely to involve a number of routes and carriers. To decide whether it has subject matter jurisdiction, the court must necessarily examine the merits to some degree to determine who was harmed, when and under what circumstances.<sup>192</sup> In such cases it might be more practical to hear all the evidence at one time rather than engaging in duplicate hearings.

The bill would also require the court to balance a number of factors in determining whether the court has subject matter jurisdiction.<sup>193</sup> Among these factors are the significance of the conduct within the United States and abroad, the nationality of the plaintiffs and defendants, the presence of a purpose to affect the United States, the significance and foreseeability of the effects within the United States and abroad, the existence of reasonable expectations that would be affected by the action, and the degree of conflict with foreign laws or economic policies.<sup>194</sup> The bill also provides rather cryptically, "nothing in this section shall be construed to authorize the court to consider the effect on foreign political relations of the United States of any action sought to be dismissed."<sup>195</sup> Based on the political nature of the factors listed, however, it would seem difficult, if not impossible, for the court to avoid considering the foreign relations impact of the case.

## V. CONCLUSION

It would seem that the best way to avoid judicial foreign policy making would be to eliminate *all* considerations of the political impact of antitrust jurisdiction. Courts should focus instead on whether the conduct alleged had

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<sup>192</sup> See P. BARLOW, *supra* note 7, at 93 n.28 (suggesting that "the effects doctrine results in subject matter jurisdiction addressing issues directed to the merits of the case.").

<sup>193</sup> S. 572, 100th Cong., 1st Sess., 133 CONG. REC. S2293 (daily ed. Feb. 19, 1987).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

a substantial and direct effect on United States consumers or competitors. Where the effect is insubstantial or indirect the United States should not claim jurisdiction regardless of whether the conduct affects imports or exports.

Enactment of such legislation would give the courts a starting point to determine the degree to which Congress sought to apply the antitrust laws. The Foreign Trade Antitrust Improvements Act of 1982 has been a step in the right direction because it definitively indicates that Congress does not think the antitrust laws should be construed to protect foreign consumers or competitors.

Any statute enacted should avoid the inclusion of subjective political evaluations in any way.<sup>196</sup> Rather, the legislation should focus on the economic impact of the trade restraint. The key to asserting jurisdiction should be that the conduct substantially, directly, and actually injured United States commerce. Factors which may indicate such an effect are the nationality of the parties, the location of performance of the illegal acts, the locations of the users of the restrained goods and services, and the location of the competitors in the restrained goods or services.<sup>197</sup> The greater the number of these factors that point to the United States, the more appropriate the exercise of jurisdiction.<sup>198</sup> Each of these factors could be determined objectively; thus, it is likely that greater uniformity of decision would result.

It might seem that eliminating considerations of foreign policy and the political aspects of the antitrust laws will

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<sup>196</sup> For a discussion of the problems courts face in attempting to apply political tests see *supra* notes 133-154.

<sup>197</sup> *Cf. Pacific Seafarers, Inc. v. Pacific Far E. Line, Inc.*, 404 F.2d 804 (D.C. Cir. 1968) (United States has employment, financial and national defense interest in jurisdiction over international transportation); *Dominicus Americana Bohio v. Gulf & W. Indus., Inc.*, 473 F. Supp. 680, 688 (S.D.N.Y. 1979) (citing origin of commerce, nationality of plaintiffs and defendants, location of users of services, and location of performance of anticompetitive acts as relevant factors).

<sup>198</sup> *Cf. RESTATEMENT, supra* note 41, § 403 reporter's note 4. The reporter's note indicates that the more permanent the links to the United States, the greater the number of activities which become subject to United States jurisdiction. *Id.*

lead to international outcry.<sup>199</sup> However, it is relatively undisputed that a nation may exert jurisdiction over conduct which adversely affects those who are located within its borders.<sup>200</sup> The cases which generally cause the political tensions are the more tenuously connected cases. By eliminating tenuously connected cases at the outset, international objection is likely to be less severe.

Consideration of economic rather than political factors is especially appropriate in international aviation. It is difficult to argue that the United States should be able to regulate foreign carriers economically merely because United States carriers compete within those foreign countries. On the other hand, when a carrier avails itself of the United States market, it must be prepared to submit to United States regulation. When United States consumers bear a significant portion of the burden of anticompetitive conduct, the United States has a legitimate interest in protecting its citizens from economic harm.

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<sup>199</sup> It might be argued that foreign governments would be displeased with anything the United States does, short of eliminating extraterritorial jurisdiction altogether. Cf. *Laker Airways Ltd. v. Sabena, Belgian World Airways*, 731 F.2d 909 (D.C. Cir. 1984) (British Secretary of State for Trade and Industry concluded that United States antitrust action threatened British trading interests).

<sup>200</sup> *Alcoa*, 148 F.2d at 443. But see P. BARLOW, *supra* note 7, at 106-08 (summarizing arguments that the effects doctrine violates international law). Note, however, that commentators concerned with the legality of the United States' extraterritorial application of its antitrust laws would not require countries to adhere to strictly territorial notions of jurisdiction. *Id.* Thus the debate is not over whether it is valid to apply United States law to foreign citizens. Rather, the argument is over precisely what circumstances justify application to foreign citizens or conduct. Because this is essentially a line-drawing dispute, the debate is certain to be endless.

